May 8, 2007

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Written *Ex Parte* Presentation
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,
CC Docket No. 94-102

Dear Ms. Dortch:

Recent press reports indicate the Commission may consider a declaratory ruling that would establish that Enhanced 911 ("E911") location compliance is to be measured at the "PSAP level."[1] Such a ruling would be of great concern to us because it would be unwise as well as unlawful. While we are committed to working with the Commission and public safety groups to optimize the capabilities of wireless E911 services, the Commission has no current proceeding to examine E911 accuracy, and no record on which it could base a new location accuracy requirement.

There is no rule that purports to establish the geographic area that should be used to measure compliance with the Commission's location accuracy rules; thus, there is no rule for a declaratory ruling to interpret or clarify. Indeed, in adopting the E911 Phase II accuracy requirement, the Commission intentionally *declined* to adopt a location accuracy methodology of any sort, including a specific geographic area (at the PSAP level or otherwise). The Association of Public-Safety Communications Officials – International ("APCO") itself recently acknowledged that "the FCC accuracy parameters are not currently applicable at the PSAP level."[2] In short, there is no rule addressing the

[1] TR Daily, "APCO: 'E911' Location – Accuracy Report Affirms Need For PSAP-Level Testing," April 9, 2007 ("FCC Chairman Kevin J. Martin is planning to circulate within the next few weeks a declaratory ruling and further notice of proposed rulemaking addressing E911 location-accuracy issues, including an APCO request that the Commission rule that location accuracy should be measured on a PSAP level an agency spokesman said Friday."). *See also* Associated Press, "FCC Seeks to Reform 911 Call Tracking," April 5, 2007 ("APCO has urged the agency to require that testing be done on a community-level basis and Martin agrees. He said he will ask the full Commission to issue an order granting APCO's request.").

[2] APCO, An Assessment of the Value of Location Data Delivered to PSAPs With Enhanced Wireless 911 Calls, April 2007, at 3 ("Project LOCATE Report"); *see also id.* at 10 ("The standard of location accuracy established by the FCC, as defined in FCC Docket Number 94-102 as amended, is not measured at the PSAP level by the [wireless service provider] nor is it required under a current FCC consent decree . . .);

issue, and the actions of all interested parties – carriers, Public Safety, and the Commission alike – reflect that fact. A declaratory ruling establishing PSAP-level accuracy requirements would thus violate the Administrative Procedure Act ("APA"). Even aside from the clear legal flaw in adopting a new standard without a rulemaking, there is no record that suggests that PSAP-level testing is technically feasible or even practical. In fact, as carriers have discussed with Commission staff in the past, a PSAP-level accuracy requirement would not be a valid way to determine how E911 systems perform.[3]

We ask the Commission to take a different approach that has the same goal – optimizing the performance of wireless E911 systems – but works toward it by engaging all stakeholders, not by preemptively and unlawfully imposing a geographic testing mandate. The Commission should adopt a Notice of Proposed Rulemaking ("*NPRM*") to address E911 accuracy issues, and at the same time convene a forum of technical experts from public safety and industry, similar to the TTY Forum, to identify methods to optimize ALI accuracy in light of current and future technologies as well as practical limitations. The Forum would have a short time period (six to twelve months) to complete a report on ways to optimize the testing and performance of E911 systems that the Commission could consider in acting on the *NPRM*. Thereafter, the Forum could continue to serve as a mechanism for facilitating collaborative action among all stakeholders.

We appreciate the critical importance of these E911 issues and will continue to work diligently with APCO, other public safety groups, and the Commission to reach appropriate solutions to these matters.[4] But these are complicated questions that remain subject to debate even within the public safety community.[5] These issues must be

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id. at 16 ("It is recognized that at present, the FCC parameters for accuracy and consistency are not measured at the PSAP, but rather the entire [wireless service provider] network with weighing allowed"); *id.* at 29 ("We understand that the FCC accuracy parameters do not currently apply at the PSAP level").

[3] *See* CTIA – The Wireless Association®, *Ex Parte* Presentation in CC Docket No. 94-102, at 2-3, filed May 3, 2007; CTIA – The Wireless Association®, *Ex Parte* Presentation in CC Docket No. 94-102, at 2-3, filed April 27, 2007; *see also* Rural Cellular Association, *Ex Parte* Presentation in CC Docket No. 94-102 et al., at 2, filed May 3, 2007.

[4] In this regard, APCO President Wanda McCarley noted in APCO's recent Project LOCATE Report that a "very positive result of this project was the meaningful working partnership between APCO International, the PSAPs and the [wireless service providers] in an effort to improve the performance and managing the expectations about response to emergency calls from wireless telephones." *See* Project LOCATE Report at 5.

[5] NENA and NASNA, for example, have supported a proposal in favor of statewide geographic area location measurement, coupled with several mandatory actions carriers would take in response to a PSAP's concern as to the performance of E911 service to that PSAP. *See* discussion *infra* regarding NENA and NASNA support for NRIC VII recommendations.

addressed in an orderly and lawful fashion, and a rulemaking combined with a technical forum will accomplish that.

BACKGROUND

In the *Third Report and Order* in this proceeding, the Commission adopted the E911 Phase II location accuracy rule but expressly declined to address geographic measurement requirements.[6] The Commission directed the Office of Engineering and Technology ("OET") to issue guidance and, since then, industry and public safety groups have worked to develop additional parameters for measuring accuracy in OET Bulletin No. 71 and other fora.

Significantly, in April 2004, the Commission directed the Network Reliability and Interoperability Council – VII ("NRIC"), through its Charter, to "[r]ecommend accuracy requirements for location information particularly for rural, suburban, and urban areas and recommend ways to verify that accuracy requirements are met."[7] If existing rules already allowed the imposition of particular accuracy verification requirements, it made no sense for the Commission to ask NRIC to recommend such requirements.

NRIC convened a broad cross section of interests, including carriers, location service vendors, public safety advocates, as well as OET staff, who worked on the various issues for more than a year and a half thereafter. In December 2005, NRIC – with the support of both industry and public safety groups, including NENA and NASNA – addressed a wide variety of Phase II-related standards of critical importance to public safety. With respect to the appropriate geographic area for E911 automatic location information ("ALI") accuracy testing, NRIC recommended that a *statewide* testing area be permitted, in conjunction with alternative methodologies for rural carriers facing particular challenges due to cell site configuration and topography.[8] Statewide compliance testing would occur once a carrier deployed Phase II to 50 percent of its cell sites and again at the 90 percent deployment benchmark.[9] In addition, NRIC

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[6] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced* 911 *Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17388, 17426 ¶¶ 83-84 (1999) ("*Third Report and Order*"), *aff'd in relevant part*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, ¶¶ 83-85 (2000).

[7] *See* Charter of the Network Reliability and Interoperability Council – VII, § B(a) (April 15, 2004). NRIC also built upon the efforts of ATIS's Emergency Services Interconnection Forum ("ESIF") Study Group G. *See id.* at n.4.

[8] *See* NRIC VII, Focus Group 1A, *Near Term Issues for Emergency/E9-1-1 Services*, Final Report, § 4.1.2, page 21 (Dec. 2005) ("NRIC VII Report"). It goes without saying that the NRIC's recommendations and actions in this regard make clear that the issue of the appropriate geographic testing area had not been previously mandated by the Commission.

[9] *Id.* at § 4.1.2, page 22.

recommended ongoing maintenance testing to ensure continued system performance.[10] The various NRIC recommendations were designed to be complementary and inseparable, representing an integrated approach to E911 accuracy.[11] APCO was the sole dissenter from the NRIC recommendations.[12]

In October 2004, while NRIC's efforts were pending, APCO separately filed a request for declaratory ruling asking that the Commission provide "clarification of Section 20.18(h) ... regarding the geographic area over which a wireless carrier must provide the levels of 9-1-1 accuracy specified in the" rules.[13] APCO stated there that the "rules do not specify the relevant area over which such accuracy is to be measured."[14] APCO initially advocated that accuracy be "measured over a geographic area corresponding to the consolidated service area of PSAPs that choose to be treated together" but in the absence of such consolidation, the "default" should be a particular PSAP's service area.[15] APCO later supplemented its request to modify its position, proposing instead to use MSAs and RSAs as the appropriate geographic area for measurement.[16]

The Commission has never requested comment on the NRIC recommendations or on APCO's request for declaratory ruling or its supplement.

JUDICIAL PRECEDENT BARS ISSUANCE OF A RULING TO IMPOSE AN ACCURACY VERIFICATION REQUIREMENT.

The U.S. Court of Appeals for the D.C. Circuit and other federal appeals courts have made clear that the Commission may "clarify" an existing rule without notice and comment rulemaking, but any "substantive changes in prior regulations" are subject to

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[10] *Id.*

[11] *See id.* at § 1.1, page 2, § 4.1.2, page 21.

[12] *Id.* at § 1.1 n.1.

[13] APCO Request for Declaratory Ruling, CC Docket No. 94-102, filed Oct. 5, 2004, at 1.

[14] *Id.* at 2.

[15] *Id.* at 5.

[16] APCO Supplement to Request For Declaratory Ruling, CC Docket No. 94-102, filed February 2, 2005, at 3-4. APCO subsequently appeared to return to a PSAP-level standard but never amended its pending Request for Declaratory Ruling accordingly. *See* APCO International *Ex Parte* Communication, CC Docket No. 94-102, filed Sept. 14, 2005. Even in that letter, APCO acknowledged that "the rules do not specify the geographic area within which that level of accuracy must be met" and "that a PSAP-level accuracy requirement will be difficult to meet in some areas by some carriers at the present time." *Id.*

APA notice and comment procedures.[17] "When the 'legislative history' of an administrative regulation evinces an intent not to cover certain subject matter, the notice-and-comment requirements of the APA cannot be evaded merely by interpreting an existing regulation to cover subject matter consciously omitted from its scope."[18] Nor may the Commission modify a definitive interpretation of a regulation without notice and comment.[19] These precedents govern the circumstances the Commission is now addressing. Here, too, there is no rule to interpret. Worse, there is no record for the Commission to rely on for any mandate that a declaratory ruling would impose.

ANY IMPOSITION OF A SPECIFIC GEOGRAPHIC TEST AREA FOR DETERMINING COMPLIANCE REQUIRES A RULEMAKING.

Section 20.18(h) of the rules was adopted in the *Third Report and Order* in this proceeding and provides in its entirety that:

> Licensees subject to this section shall comply with the following standards for Phase II location accuracy and reliability: (1) For network-based technologies: 100 meters for 67 percent of calls, 300 meters for 95 percent of calls; (2) For handset-based technologies: 50 meters for 67 percent of calls, 150 meters for 95 percent of calls. (3) For the remaining 5 percent of calls, location attempts must be made and a location estimate for each call must be provided to the appropriate PSAP.[20]

The rule obviously makes no reference whatsoever to any test methodology, much less to the specific geographic parameters to be used. This was, in fact, the Commission's intended result. When the Commission adopted the current Phase II ALI

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[17] 5 U.S.C. § 553(c); *Sprint Corp.* v. *FCC,* 315 F.3d 369, 374 (D.C. Cir. 2003). The D.C. Circuit in *Sprint* noted that "[W]hen an agency changes the rules of the game. . . more than a clarification has occurred. To conclude otherwise would intolerably blur the line between when the APA notice requirement is triggered and when it is not." *Id.* In an analogous context, the Third Circuit found that "because the initial rule did not address the issue of sightlines over standing spectators, the subsequent interpretation of that rule to include such a requirement was really an adoption of a new regulation without notice and comment." *See SBC Inc.* v. *FCC,* 414 F.3d 486, 501 n.8 (3d Cir. 2005) (describing *Caruso* v. *Blockbuster-Sony Music Entertainment Centre,* 193 F.3d 730 (3d Cir. 1999)).

[18] *Caruso* v. *Blockbuster-Sony Music Entertainment Centre,* 968 F.Supp. 210, 216 (D.N.J. 1997), *aff'd in relevant part* 193 F.3d 730, 736-37 (3d Cir. 1999); *see also United States* v. *Picciotto,* 875 F.2d 345, 346-48 (D.C. Cir. 1989) (where a rule contains "open-ended" provision stating that a "permit may contain additional reasonable conditions" and additional conditions were subsequently issued without notice and comment, court found that agency had amended rule without notice and comment).

[19] *See Shalala* v. *Guernsey Memorial Hosp.,* 514 U.S. 87 (1995); *Alaska Professional Hunters Ass'n, Inc.* v. *FAA,* 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Paralyzed Veterans of America* v. *D.C Arena,* 117 F.3d 579, 586 (D.C. Cir. 1997).

[20] 47 C.F.R. § 20.18(h); *Third Report and Order* at ¶¶ 83-84.

accuracy rules, it affirmed that it had previously "declined to adopt specific methods for measuring compliance with the E911 rules, relying instead upon the parties to resolve technical issues in good faith."[21] The Commission then observed that parties have worked collaboratively on technical issues and that "[s]pecific methods for verifying compliance are currently being explored by standards-setting and other technical bodies."[22]

The Commission went on to expressly refrain from mandating specific measurement requirements in the *Third Report and Order*, turning instead to OET and the Wireless Telecommunications Bureau ("Bureau") to develop "guidance" in recognition of the complexity of the subject:

> We recognize that the entities subject to our rules need guidance on appropriate methods for determining compliance with the location accuracy requirements. Accordingly, we are tasking the Office of Engineering and Technology (OET) and the Bureau to expeditiously develop and publish methods that *may* be used for verifying compliance with our rules governing Phase II. In developing appropriate compliance verification methods, OET and the Bureau should work along with all interested parties, including equipment manufacturers, system operators, public safety organizations, standards groups, and organizations with relevant expertise in performing such measurements. In developing these methodologies, OET and the Bureau are expected to take into account the practical and technical realities. For example, we recognize that in some instances, calls cannot be completed and ALI cannot be provided. Also, the methodology may need to give appropriate weight to the variety of conditions and locations in which wireless equipment is used.[23]

Consistent with Commission direction, OET released Bulletin No. 71 which provides methods that carriers "may" follow but does not impose mandatory rules.[24] In fact, OET stated that the Bulletin was "*not intended to establish mandatory procedures"* and that "*other methods and procedures may be acceptable if based on sound engineering and statistical practices.*"[25] It should be noted that OET Bulletin No. 71 was

[21] *See Third Report and Order* at ¶ 83.

[22] *See id.* at ¶ 84.

[23] *Id.* at ¶ 85 (emphasis added). As in *Caruso*, the *Third Report and Order* here "evinces an intent not to cover certain subject matter" and, thus, the Commission must comply with the APA's notice and comment rulemaking requirements. *See Caruso*, 968 F.Supp. at 216.

[24] OET Bulletin No. 71, *Guidelines for Testing and Verifying the Accuracy of Wireless E911 Location Systems*, at 4 (rel. April 12, 2000).

[25] *Id.* at 2 (emphasis in original).

not published in the Federal Register, so it cannot be interpreted as a binding rule and, thus, clarification of OET Bulletin No. 71 would be equally non-binding.[26]

Notably, in the context of E911 consent decrees, the Commission itself has characterized system-wide measurement as a permissible calculation area under OET Bulletin No. 71 and stated that "accuracy testing may be based on, *among other things*, the coverage area of local PSAPs that request Phase II deployment *or* the wireless carrier's entire advertised coverage within a metropolitan area."[27] Thus, even in the context of consent decrees, the Commission affirmed that accuracy testing need not be at the PSAP level. The consent decrees, moreover, do not point to a rule regarding geographic area measurement, because there is none. Finally, APCO itself recognizes that the rules "do not specify the relevant area over which [ALI] accuracy is to be measured" and that the OET Bulletin does not require measurement at the PSAP (or any other particular) area.[28]

Any ruling at this juncture establishing a geographic area for E911 accuracy testing would cover subject matter the Commission expressly declined to address when it adopted the initial rule and thereby "change[s] the rules of the game."[29] It would thus amount to a substantive rule change requiring a notice and comment rulemaking.

THE COMMISSION CAN ADDRESS CONCERNS REGARDING ALI ACCURACY BY ADOPTING A NOTICE OF PROPOSED RULEMAKING AND CONVENING AN E911 ACCURACY FORUM.

The fact that the Commission must proceed via a notice and comment rulemaking does not leave it without recourse to meaningfully address its concerns regarding ALI accuracy. The Commission is free to define the scope of the *NPRM* in order to meet the objective of optimizing ALI accuracy. In this regard, we submit that in conjunction with an *NPRM*, in order to ensure that it has a sufficient record and factual basis for any final

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[26] 5 U.S.C. § 552(a)(1)(D); *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977); *Nelson Broadcasting Corp.*, 6 FCC Rcd 1765 (1991).

[27] *See Cingular Consent Decree*, 18 FCC Rcd 11746, n.9 (2003) (emphasis added); *Cingular Consent Decree*, 17 FCC Rcd 8529, n.7 (2002) (similarly referring to "network-wide location accuracy").

[28] *See* APCO Request at 2 (the Bulletin "does not provide clear guidance as to whether the relevant area of measurement should be a PSAP service area, a carrier's service area, *or some other alternative*." (emphasis added)).

[29] *See Sprint*, 315 F.3d at 374; *see also National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 235 (D.C. Cir. 1992) ("'[i]f a second rule … is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.'" (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 386)).

rules, the Commission should convene an "E911 Accuracy Forum" ("Forum"), similar to the TTY Forum which was instrumental in the development of backward-compatible technical solutions for digital wireless technologies and TTY devices.[30] Indeed, some E911 solution providers have already advocated the benefits of this approach.[31] *The Forum would be a technical solutions body* whose purpose/scope of work would be defined by the Commission, consistent with any tentative conclusions reached in an *NPRM*. The Forum would be tasked with reporting the following to the Commission within an appropriate time frame (e.g., six to twelve months):

- Based on existing test data and new testing, the accuracy levels achievable today for deployed systems using ESIF testing methodology by topology (indoor, urban, rural, suburban, highway, etc.) and at different geographic boundary levels (*e.g.* PSAP, MSA/RSA, County, State). This more comprehensive data would be used to identify and develop solutions, through industry-Public Safety cooperation, to optimize existing deployed systems and to determine the extent to which current and proposed accuracy rules can be met by the deployed systems and under what circumstances.

- The feasibility and desirability of related rules governing ALI formatting, database queries, and network redundancy concerns also addressed at NRIC VII.[32]

The Forum would be principally staffed by engineers and technical subject matter experts, not policy advocates. Invited participants would include Commission staff, Public Safety, telecommunications industry (wireless and LECs), infrastructure vendors, location vendors (with proven, deployed technology), handset vendors, and Commission staff. All participants would sign NDAs to access confidential data necessary to drive technical solutions. *Importantly, the Forum would build upon, not repeat, the work already undertaken at NRIC and at other standards bodies (such as ATIS), and APCO's*

[30] The TTY Forum played an integral role in promoting the awareness and development of digital-TTY solutions. *See* Public Notice, *Wireless Telecommunications Bureau Reports on Status of Pending TTY Waiver Petitions*, CC Docket No. 94-102, DA 99-895, at 2 (rel. May 13, 1999) (describing TTY Forum efforts and participants and acknowledging recent discussion of "a potential solution to the TTY/digital problem."). As the Commission stated, "[t]he TTY Forum has done an excellent job of helping carriers move toward the goal of making digital wireless systems widely accessible to TTY devices." *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Report and Order, 15 FCC Rcd 25216, ¶ 14 (2000).

[31] *See* Intrado April 23rd *Ex Parte* ("Intrado encouraged the Commission to convene all the 911 Stakeholders and establish a long term plan …"); TruePosition, Inc., *Ex Parte* in CC Docket No. 94-102, filed April 11, 2007 ("Commission should convene the various E911 stakeholders … to discuss the current state of wireless E911 deployment" under "[a]n open forum format.").

[32] *See* NRIC VII Report at §§ 4.3-4.5, pages 24-38.

Project LOCATE.[33] In this regard, establishing the Forum would provide the opportunity for all wireless E911 stakeholders, especially those who did not have the opportunity to participate in the NRIC process or be briefed on the comprehensive NRIC recommendations, to better understand the myriad complicated issues associated with location accuracy measurement.

The results of the Forum, together with the record developed in response to *NPRM*, would establish a basis for the Commission to adopt binding rules and would avoid the APA violation resulting from a declaratory ruling. The Forum and *NPRM* would also be able to address the practical compliance implications of a particular ALI accuracy methodology or testing regime – a critical consideration given the over 6000 PSAPs in the United States, each with its own deployment, topography and RF propagation issues.

CONCLUSION

We stand ready to work diligently and constructively with the Commission and other interested parties to resolve these matters and make sure that wireless customers and the nation's PSAPs benefit from E911 technologies. We agree that it is appropriate for the Commission to examine the state of those technologies and to consider the need for additional direction to wireless providers and PSAPs, but the right process for doing so is through a rulemaking where the Commission can receive the benefit of technical and other information about E911 capabilities.

[33] In this regard, NRIC's recommendations expressly recognized the desirability of optimizing ALI accuracy at the individual PSAP level and provided a mechanism for individual carriers and PSAPs to address those concerns. *See* NRIC VII Report at App. E, pages 52-54.

Please contact the undersigned if there are questions concerning this filing.

Sincerely,

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